89-43

Supreme Court, U.S.
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JUL 7 1989
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No. _____

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF GEORGIA

PETITIONER'S BRIEF

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QUESTION PRESENTED

1. Whether statements made during a Field Sobriety Test, including, but not limited to, the recitation of the alphabet, should be excluded from trial given that they were elicited by police while the Petitioner was in custody and without the benefit of *Miranda* warnings?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ii

OPINION BELOW 1

JURISDICTION OF THIS COURT 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. THE FIFTH AND FOURTEENTH AMENDMENTS 4

CONCLUSION AND PRAYER 6

APPENDIX A-1

TABLE OF AUTHORITIES

CASES:

Hughes v. State of Georgia, ___ Ga. ___ (Case No. 46585) 1, 3

Schmerber v. California, 384 U.S. 757, 761 (86 S.Ct. 1826, 16 L.Ed.2d 908)(1966) 4

State of Georgia v. Hughes, 189 Ga. App. 671, (377 S.E.2d 192)(1988) 3, 4

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 3, 4

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTIONAL PROVISIONS:

Fifth and Fourteenth Amendments (generally throughout brief and Item I)

STATUTES:

28 U.S.C. Section 1957(3). 1

OPINION BELOW

The opinion of the Supreme Court of the State of Georgia, *Hughes v. State of Georgia*, ___ Ga. ___ (Case No. 46585), affirming in part and reversing in part the decision of the Court of Appeals of the State of Georgia is reproduced in the Appendix, beginning at page A-1.

JURISDICTION OF THIS COURT

The opinion of the Supreme Court of the State of Georgia was decided on May 10, 1989. That Court's decision regarding federal constitutional questions conflicts with applicable provisions of the United States Constitution and decisions of the United States Supreme Court.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Fifth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

The Fifth Amendment to the United States Constitution, in relevant part, states as follows:

"No person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

The Fourteenth Amendment to the United States Constitution, in relevant part, states as follows:

"No State shall make or enforce any law which deprive[s] any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Officer J.R. Barner, while off-duty and operating his own vehicle, was forced off the road by the erratic driving of the Petitioner. Officer Barner followed the Petitioner's vehicle and observed Petitioner commit numerous traffic offenses. When Petitioner eventually pulled into the parking lot of an apartment complex and stopped, Officer Barner followed and pulled in behind Petitioner's vehicle. Officer Barner approached Petitioner and identified himself as a police officer. Officer Barner produced his identification. At the request of Officer Barner, bystanders telephoned 911 to relay the report that an officer was in need of assistance in the parking lot of the apartment complex and, within three or four minutes, other officers arrived at the scene. During those few minutes before the other officers arrived, Officer Barner asked Petitioner for his driver's license and he engaged Petitioner in conversation. At one point, Petitioner requested to leave, but Officer Barner informed him that he would not be allowed to do so. Officer Littler, who arrived at the scene in response to Officer Barner's request for assistance, asked Petitioner to perform a field sobriety test which included reciting the alphabet. Based upon Petitioner's performance of those tests and the information supplied by Officer Barner, Officer Littler placed Petitioner under formal arrest for driving under the influence. At no time prior to this formal arrest by

Officer Littler was Petitioner ever advised of his *Miranda* rights.

Prior to trial, Petitioner filed a motion to suppress and a motion in limine. The trial court conducted a hearing and concluded that Officer Barner had "effected an arrest of [petitioner] when he informed [petitioner] that he could not leave the scene of the initial stop." Because Petitioner had not been given his *Miranda* rights at that time, the trial court granted Petitioner's motions, precluding the introduction at Petitioner's trial of any testimony concerning the conversation between Petitioner and Officer Barner which had occurred prior to the formal arrest and of any evidence of the field sobriety tests which had been conducted by Officer Littler prior to the formal arrest. The State appealed from this order of the trial court.

In *State of Georgia v. Hughes,* 189 Ga. App. 671, (377 SE2d 192) (1988), the Court of Appeals of the State of Georgia reversed the judgment of the trial court which had suppressed conversations between Petitioner and the police and all references to field sobriety tests given to Petitioner prior to formal arrest. The Supreme Court granted the writ of certiorari and in *Hughes v. State of Georgia,* ___ Ga. ___ (Case No. 46585, decided May 10, 1989), the judgment of the Court of Appeals of the State of Georgia was affirmed in part and reversed in part. The Supreme Court of Georgia held that "the trial court correctly suppressed reference to conversations between [Petitioner] and the police." *Hughes v. State,* supra. However, the Supreme Court affirmed the Court of Appeals reversal of the trial court's suppression order with regard

to "the alphabet test and the physical dexterity tests." *Hughes v. State*, supra.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AND SIXTH AMENDMENTS

That part of the Georgia Supreme Court's decision which is being appealed holds, "that the alphabet test and physical dexterity tests were not inadmissable under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature." *State of Georgia v. Hughes*, 189 Ga. App. 671, (377 S.E.2d 192) (1988); *Schmerber v. California*, 384 U.S. 757, 761 (86 S.Ct. 1826, 16 L.Ed.2d 908)(1966).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court held that a person subjected to custodial interrogation must be warned that he has a right to remain silent, that any statement he does make can be used in evidence against him, and that he has the right to the presence of an attorney, either retained or appointed. The Court further acknowledged that a Defendant may waive these rights, but only if the waiver is made voluntarily, knowingly and intelligently will it render subsequent confessions admissible. The Supreme Court in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) reaffirming the *Miranda* decision stated that "the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications[.]" The Court recognized, however, that "the privilege is a bar against compelling

'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." 384 U.S. at 763-64, 86 S.Ct. at 1832, 16 L.Ed.2d at 916.

The only issue presented for this Court's determination is whether the Fifth Amendment privilege against self-incrimination applies to evidence of statements made during a field sobriety test. This Court must examine whether a Defendant's statements made during a field sobriety test is a communicative act involving that person's testimonial capacities or if it is real or physical evidence which does not fall within the privilege. In this case the officer asked the Petitioner specific questions to which a response from the Petitioner was demanded and, in fact, orally given. Accordingly, any statements obtained from the Petitioner and spoken to the police officer, including the alphabet test, violates the privilege against self-incrimination and therefore must be suppressed.

CONCLUSION AND PRAYER

The Fifth Amendment rights are fundamental, and review is warranted to impose consistency in accordance with this Court's established precedent. This Court's supervisory authority should be exercised to correct the error committed by the Court of Appeals and the Supreme Court of Georgia. Review should be granted, and upon review this case should be remanded for trial in accordance with those issues discussed here.

This the 7th day of July, 1989.

Respectfully submitted by,

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APPENDIX

SUPREME COURT OF GEORGIA

ATLANTA May 10, 1989

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHN ERIC HUGHES v. THE STATE

It is ordered that this Court's judgment of May 4, 1989, is hereby vacated and a new judgment of affirmed in part and reversed in part, with Marshall, C.J., dissenting to division 1 and the judgment of reversal, be entered.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Joline B. Williams Clerk

In the Supreme Court of Georgia

Decided:

46585. HUGHES v. STATE.

GREGORY, Justice.

After observing appellant Hughes' erratic driving, an off-duty police officer pulled behind Hughes' parked car, showed Hughes his identification, called for assistance, and refused to let Hughes leave. After talking with Hughes, the officer asked another officer who had arrived on the scene to give Hughes a sobriety test. The officers then placed Hughes under formal arrest for driving under the influence.

The trial court granted Hughes' motion to suppress. The trial court held that the situation had progressed beyond the point of an investigatory stop and that the officer had effected an arrest when he told Hughes he was not free to leave. Because *Miranda* warnings were not given at that time, the trial court suppressed the conversations and sobriety tests.

In *State v. Hughes*, 189 Ga. App. 671, ___SE2d___ (1988), the Court of Appeals reversed. The Court of Appeals held that the detention and refusal to let Hughes leave did not result in an arrest. Because the brief investigatory stop did not become an arrest until after Hughes performed the field sobriety tests, the Court of Appeals concluded that *Miranda* warnings were not necessary before the conversations or the tests.

On February 8, 1989 we granted certiorari to consider whether the Court of Appeals was correct in reversing the trial court's determination that the officer effected an

arrest when he informed Hughes that he was not free to leave the scene of the initial stop.

1. The test for determining whether a person is "in custody" at a traffic stop is if a reasonable person in the suspect's position would have thought the detention would not be temporary. *Berkemer v. McCarty*, 468 U.S. 420, 442 (104 SC 3138, 82 LE2d 317) (1984). Because there is evidence in the record to support the trial court's determination that Hughes was arrested when he was told he was not free to leave, we will not disturb it. *State v. Louis*, 185 Ga. App. 529 (364 SE2d 896) (1988). Therefore, we reverse the Court of Appeals' determination that this was not an arrest.

2. Because the police did not give Hughes *Miranda* warnings at the time of the arrest, the trial court suppressed all conversations between the officers and Hughes after the officer told Hughes he was not free to leave. The trial court also suppressed all reference to the field sobriety tests.

a). In *Miranda v. Arizona*, 384 U.S. 436, 478 (86 SC 1602, 16 LE2d 694) (1966), the Supreme Court held that "when an individual is taken into custody . . . and is subjected to questioning, the privilege against self-incrimination is jeopardized." Because the trial court found that hughes was under arrest at the scene of the initial stop and the officer failed to give the required warnings, the trial court correctly suppressed reference to conversations between Hughes and the police.

b). Hughes' motions were based solely on the United States Constitution. He did not argue that the field sobriety tests should be suppressed under OCGA

§ 24-9-20. Therefore, we hold that the alphabet test and the physical dexterity tests are not inadmissible under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature. *Schmerber v. California,* 384 U.S. 757, 761 (86 SC 1826, 16 LE2d 908) (1966).

Judgment affirmed in part and reversed in part. All the Justices concur, except Marshall, C.J., who dissents to division 1 and the judgment of reversal.